IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL NO. 11 OF 2005
In
COMPANY APPLICATION NO. 300 OF 2003

With

CIVIL APPLICATION NO. 58 OF 2005
In
O.J.APPEAL NO. 11 OF 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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M/S. AMIN TRADERS - Appellant(s)
Versus
TEXTILE LABOUR ASSOCIATION & ORS. - Respondent(s)

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Appearance :
MR. SAURABH SOPARKAR, SR. COUNSEL,
with MRS.SWATI SOPARKAR for Appellant(s).
MR. D.S. VASAVADA for Respondent(s) : 1,
MR. R.M. DESAI for Respondent(s) : 2.
NONE for Respondent(s) : 3.
NONE for Respondent(s) : 4.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 23/03/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. Present is an appeal by M/s.Amin Traders, alleged tenant, being dissatisfied and aggrieved by the Order dated 22nd February, 2005 passed by the learned Company Judge in Company Application No.300 of 2003 in Company Petition No.79 of 1989, directing the appellant to vacate the disputed premises of the Mills Company (in liquidation).

2. For proper appreciation of the facts, which are little chequered, the history of the matter is required to be looked into.

2.1 After M/s. Vijaya Mills Limited was taken in liquidation, directions were issued by this Court to the Official Liquidator to take possession of the property. The Official Liquidator went to take possession of the property and reached the spot on 3rd February, 1994. As many as eleven persons were present on the spot, including the Official Liquidator, when they proceeded to take possession, they found that at the main entrance, one Reeling Contractor was holding possession of the premises. On being asked, Shri Brahmbhatt (a representative of the Company - Ex Management)informed the Official Liquidator that the said Reeling Contractor was holding the possession of the said premises since last ten

years. One Mr.Babubhai, owner of M/s.Amin Traders, informed the Official Liquidator that “they were doing reeling contract with the Mills Company and he was provided the premises on monthly _ _ _” (there is a blank space in the spot memo prepared by the Official Liquidator) “of Rs.100 only and the same was paid upto 31st December, 1987”. The said Babubhai also informed the Official Liquidator that the rent beyond 31st December, 1987 could not be paid since the Mills Company was closed and no management was on record. Based upon these informations, the Official Liquidator submitted a report before the Court.

2.2 It is to be seen that one of the secured creditors, namely, Central Bank of India, submitted Company Application No.205 of 1994 with the prayers that the premises in possession/occupation of one Babubhai Mansuri, trading under the name and style of M/s.Amin Traders, and Shri Rameshbhai Parikh, trading under the name and style of M/s. Comat Dyestuff Pvt. Ltd. be evicted. It appears that the present appellant, M/s.Amin Traders, took an objection to the application submitted by the Central Bank of India and submitted to the Court that in view of the spot memo and the report of the Official Liquidator, they cannot be evicted. Placing reliance upon certain documents, which were submitted by the present appellant, and the report of the Official Liquidator, the learned single Judge, while disposing of Company Application No.205 of 1994, in his Order dated 31st January, 1996 observed

that the said Babubhai was in possession of the premises and from the Report dated 6th October, 1994 submitted by the Official Liquidator, it would clearly appear that the present appellant was trading in the premises and he was in possession of the same since last many years; he paid the rent regularly upto a particular period. The Court, *vide* its Order dated 31st January, 1996, rejected the prayer of the Central Bank of India, making the observations in favour of the present appellant.

2.3 The Textile Labour Association, which came into picture subsequently, took out Judges Summons somewhere in June-2003 for the following prayers:

> "(A) To please direct the OL to take steps to evict the respondent from the premises of Vijaya Mills Ltd. as he has taken many illegal connections and he is also using the mill premises for unauthorised and illegal use;
>
> (B) To please direct the Sale Committee to dispose of the land immediately after evicting the respondent no.3;
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> (C) Respondent no.4 may be directed to inform this Hon'ble court as to when and under whose order or application the meter as shown in the photograph was put up on 5.2.2003;
>
> (D) To grant such other and further relief(s) as are deemed fit in the interest of justice;"

Notices were again issued to the present appellant. The present appellant submitted to the Court that in view of

the earlier findings recorded in Order dated 31st January, 1996 and the fact that they were holding possession of the property as a tenant for long many years and were paying the rent regularly to the Official Liquidator, they could not be evicted. After the parties joined the issue, the learned single Judge heard the parties. Lo and behold, pandora's box was opened in the Court. Number of objections were raised by the Textile Labour Association and the Official Liquidator and they were clear in their submission that the earlier Order dated 31st January, 1996 was a result of fraud; the present appellant was not a tenant; the document on which the appellant was placing reliance was forged, concocted and manufactured. The present appellant, taking an exception to all the allegations, submitted to the Court that in light of the earlier findings, the Court was not entitled to look into the matter and if such were the allegations, then, the parties be asked to go to the ordinary Civil Court/Rent Court where a detailed inquiry into the facts can be made. The learned single Judge, after hearing the parties, found that the first order was obtained after suppressing the material facts and he also pointedly recorded a finding that the documents, on which the appellant was placing reliance, were concocted and forged. He has also observed that in view of his findings, the present appellant is required to be evicted from the premises.

2.4 Being aggrieved by the present Order dated 22nd

February, 2006, the appellant is before this Court under Section-483 of the Companies Act, 1956.

3. Mr.Saurabh Soparkar, learned Senior Counsel for the appellant, submitted that the learned single Judge was absolutely unjustified in observing that the first order was based on a fraud and was a result of suppression of material facts. He submitted that unless some party before the learned single Judge made a request or submitted some application that the first order deserved to be recalled, the order could not be set aside, recalled or ignored.

Contending contrary to these submissions, learned Counsel – Mr. R. M. Desai, Mr. D.S.Vasavada, Mr. Navin Pahwa with Mr. B. C. Dave submitted that once the Court records a finding that the first order was obtained by playing a fraud upon the Court, then, the trite law that fraud vitiates everything right from the inception would come into operation and the learned single Judge was absolutely justified even in not recalling the first order or setting aside the same but ignoring the same. It is submitted by them that the order passed by the learned single Judge is perfectly justified and does not call for any interference.

4. Mr.Soparkar has submitted that from the Memorandum prepared by the Official Liquidator on 3rd February, 1994,

which was prepared on the spot, it would clearly appear that the Ex-Management was candid in its submission that the present appellant was a tenant in the premises. He submits that if on the strength of the report submitted by the Official Liquidator, the Court recorded a finding in favour of the present appellant, then, that order cannot be questioned.

5. Mr.Desai, learned Counsel for the Official Liquidator, has submitted that the Official Liquidator had no personal knowledge about anything. When he went to the spot, he was informed by the Ex-Management and the present appellant that the present appellant was the tenant and if relying upon that statement and as there was no reason to doubt the submissions at that stage, the Official Liquidator made a submission to the Court that the appellant was in possession and was paying rent, then, such report would not be binding for all times.

6. In our opinion also the Official Liquidator obviously would have no personal knowledge of anything because he is not the person connected with the Ex-Management, the purchaser or with the person in possession. Whatever information is given to the Official Liquidator is required to be revealed by him in his report to the Court. In the present case, if the Ex-Management and the present appellant were making submission that the appellant was the tenant, then, for

the Official Liquidator, there was no reason to say contrary to it. The Central Bank of India when made an application, then, on the strength of these two documents, i.e. Memorandum prepared on the spot and the submissions made in the Official Liquidator's Report, the learned single Judge observed that the present appellant was in possession and was paying rent.

7. The first order if is based on the information supplied by the Official Liquidator, which later on is said to be wrong information, then, obviously, the information would not stand on proper foundation and any construction made on the strength of such a foundation would collapse. Though the learned single Judge has entered into the disputed questions of facts and has observed that the rent receipts and other documents are forged, but, in our considered opinion, the moment it was brought to the notice of the learned single Judge that the first order was obtained on an information, which was not correct, the learned single Judge should have observed that the first order falls to the ground.

8. It was next submitted by Mr.Soparkar that in the Judges Summons, taken out by the Textile Labour Association, no prayer for recall of the Order dated 31st January, 1996 was made. After taking us through the prayer clause in the Judges summons, Mr.Soparkar submitted that the only prayer was to evict the appellant because of its illegal activities. His

further submission is that if the Court was of the opinion that the present appellant was in illegal possession, then only the learned Judge could set aside the first order, but, in the present case, the learned single Judge has not set aside the first order but has directed eviction of the appellant.

The submissions of the learned Counsel for the respondents are that the learned single Judge, when was convinced after hearing the arguments of the parties that not only the appellant was engaged in illegal activities, but, his possession itself was illegal and the protection earlier granted to the appellant was unfounded, was absolutely justified in directing the eviction.

9. Mr.Desai vehemently contended that if the order of the Court is result of fraud, then, the order is nonest and the Court is competent, in its inherent jurisdiction, either to recall it or to ignore it.

10. Taking a serious exception to the last submission of Mr.Desai, placing reliance upon a judgement of the Supreme Court in the matter of ***Indian Bank vs. M/s. Satyam Fibres (India) Pvt. Ltd.***, [***AIR 1996 SC 2592***], Mr.Soparkar submitted that even if the order was result of a fraud, the Court could not ignore it, but, the Court was required to recall the said order and only thereafter, the Court could proceed with the

matter.

11. So far as the powers of the Court in recalling the earlier orders are concerned, the same are unfettered. Under Order XLVII, the right of a party to ask for a review of the order is only on limited grounds. Under Order XLVII, Rule-1, read with Section-114 of the Code of Civil Procedure, an order can be recalled by the Court which had passed it if it is satisfied that there was discovery of new and important matter or evidence, which after the exercise of due diligence was not within the knowledge of the appellant or could not be produced by the appellant at the time when the order was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

12. In a case where the Court is satisfied, on an application by the applicant, that there, in fact, is discovery of new and important matter or evidence, which was not within the knowledge of the applicant, or which was though within his knowledge, but, could not be produced despite exercise of due diligence, or that there was some mistake or error apparent, on the allegations made by the party, the order can be recalled or reviewed, but, if the Court is of the opinion that there is an error or mistake apparent on the face of the record, or even otherwise there are sufficient reasons for recalling the said order, then, the Court would certainly recall the order. In the

matter of ***Indian Bank vs. M/s. Satyam Fibres*** (*supra*), the Supreme Court has observed, placing its reliance upon the judgement of Smith v. East Elloe Rural District Council 1956 AC 736, that the effect of fraud would normally be to vitiate any act or order. In the matter of Lazarus Estate Ltd. v. Beasley, (1956) 1 QB 702 at 712, Denning LJ said:

> "No judgement of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

The Supreme Court has further observed that "the judiciary in India also possesses inherent power, specially under Section 151 CPC to recall its judgment or order if it is obtained by Fraud on Court". The Court also observed that "since fraud affects the solemnity, regularly and orderliness of the proceedings of the Court and also amounts to an abuse of the process of Court, the Courts have been held to have inherent power to set aside an order obtained by fraud practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order."

13. Once the Court is satisfied that the order has been

obtained from it after playing a fraud or a ground akin to fraud upon the Court, which, in our opinion, would include suppression of material facts from the Court, then, the Court would have inherent powers to recall the said order. In the present matter, true it is, that the Textile Labour Association did not, in specific terms, ask for review or recall of the Order dated 31st January, 1996, but, once the matter was opened before the Court and the things started floating on the surface, then, the Court could not close its eyes to the said facts. Once the Court observed and recorded a finding that the first order was obtained by suppressing the material facts or by playing a fraud, then, the Court was certainly justified in ignoring the said order. True it is, that at that stage, the Court was required to recall the first order and relegate the parties to their earlier position and in this case, the Court proceeded further in the matter and issued an order of eviction. In our opinion, that part of the order where the appellant was directed to be evicted cannot be approved by us.

14. Mr.Soparkar further submitted that unless the Court records a finding that fraud was played upon the Court, the order cannot be deemed to have been recalled. He submits that neither impliedly nor explicitly the learned single Judge had recalled the order, therefore, this Court should set aside the order passed by the learned single Judge and remit the matter to the learned single Judge with a direction that he should

give proper opportunity to the parties to lead evidence, hear the parties properly and then record a finding that whether the first order was obtained by playing a fraud and whether the appellant is liable to be evicted.

15. In our considered opinion, such an exercise is not required to be entered into in view of the findings recorded by the learned single Judge. We would simply say that we are satisfied that the findings recorded by the learned single Judge do not call for any interference. However, we would make it clear that the findings recorded by the learned single Judge in this order would be binding on the parties for recall of the first order only and would not affect the merits of the matter or the rights of the parties. We also hereby observe that the findings recorded by the learned single Judge in the application submitted by the Textile Labour Association are only for the purposes of recalling the earlier order and nothing beyond that. The order passed by the learned single Judge though does not specifically say that the earlier order dated 31st January, 1996 stands recalled, but, in our considered opinion, the learned single Judge, by proceeding further in the matter, had made it clear that he was recalling the first order and was proceeding further in the matter. We make it clear that the Order dated 31st January, 1996 stands recalled and all the parties are relegated to their original positions. The applications submitted by the Central Bank of

India and the Textile Labour Association stand revived. The parties to the present *lis*, including the Official Liquidator, Textile Labour Association, secured creditors, purchasers and the present appellant, would be entitled to make their submissions before the learned Company Judge and if an occasion arises, they may ask for an opportunity to lead evidence. We make it clear that the learned single Judge, while proceeding with the matter or while making the inquiry, would not be influenced by the findings recorded in the order impugned, but, shall decide the matter afresh after giving due opportunity of hearing to the parties. If the learned single Judge is of the opinion that the claim lodged by the present appellant is genuine and *bona fide,* then, obviously he will have to pass orders in accordance with law and in case he finds that the documents, on which the claim of the appellant is based, are forged, concocted or manufactured, then, nothing would prevent the learned single Judge from making an order of eviction.

16. With the aforesaid clarifications and directions, the appeal stands disposed of. The parties present in the Court shall appear before the learned single Judge on 30th March, 2006 for taking further instructions in the matter from the learned Company Judge. The parties are directed to maintain *status quo* upto 30th March, 2006 and a prayer for continuance of the order of *status quo* may be made by the appellant to the learned single Judge.

17. In view of the disposal of the appeal, O. J. Civil Application No.58 of 2005 stands disposed of. No costs.

[R.S.Garg, J.]

[Ravi R. Tripathi, J.]

*kamlesh**